Supreme Court of Errors

SUPREME COURT OF ERRORS,

FAIRFIELD COUNTY,

October Term, 1887.

STATE OF CONNECTICUT

vs.

NATHANIEL E. WORDIN.

DEFENDANT'S BRIEF.

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vs.
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STATEMENT OF CASE.

The Common Council of the City of Bridgeport in sec. 5, p. 140, Charter and Ordinances of the City of Bridgeport, ordained that "Every physician, or person acting as such, who shall have any patient within the limits of the said city, sick with small pox or varioloid, or other infectious or pestilential disease, shall forthwith report the fact to the mayor or to the clerk of the Board of Health, together with the name of such patient, and the street and number of the house where such patient is treated, and, in default of so doing, shall forfeit and pay not exceeding fifty dollars for each and every such offense."

The defendant, a physician of the city of Bridgeport, failed to report a case of infectious disease as required (supra) and was duly convicted and fined. He has appealed to this Court to test the constitutionality and validity of the ordinance under which he was convicted.

It does not appear from the Finding for what particular public purpose the ordinance was enacted. It has been described to be an Act of Police, designed to promote the salubrity and good health of the municipality.

The determination of the legislature is not conclusive that a purpose for which it directs private property to be taken, is a public, that is a question for the judicial power.

Talbot vs. Hudson, 16 Gray, 421; Coster vs. Tidewater Co, 3 C. E Gr.. 68; Underwood vs. Green, 42 N. Y. 142.

If the Court can take judicial notice that such is the object of the ordinance it is in order to examine the provisions of the charter of this municipality and find by what authority the common council made this enactment.

On p. 24 of Charter of City of Bridgeport, under a general grant of power, the common council may legislate "Relative to the cleanliness and health of the city," and on p. 25 id. "Relative to any and all other subjects that shall be deemed necessary and proper for the protection and preservation of the health, property and lives of the citizens; provided, that no order or ordinance of said city shall be made repugnant to the laws of this State or of the United States."

Presumably under these general grants of power the common council enacted the ordinance whose validity we question.

There is this difference between the legislative enactment and the municipal ordinance—The legislature is the sole judge of the necessity for and reasonableness of its acts. Whatsoever it may do, keeping within the Constitution of the State and of the United States, is of binding effect. The discretion of the legislature is its own, none can successfully question it. Not so with the enactment of the municipality. Save when the legislature has defined, specified and outlined in the charter of the municipality the character of the ordinance for enactment and prescribed the mode of its exercise, of each ordinance the Court must enquire—

Was the necessity for the exercise of this power apparent?—Did sound policy direct its enactment? In short, is it reasonable?

Dillon on Municipal Corp. 3d ed. § 328.

The ordinance we question was passed under a grant of power general in its nature: it must, therefore, be reasonable or it is void.

The questions for discussion and decision are these:

1. Is this ordinance repugnant to any of the provisions of the State or Federal Constitutions?

2. Is it reasonable?

POINT I.

The ordinance is against Sec. 9 of Act 3 of the State Constitution which forbids that any person should be deprived of his life, liberty or property without due course of law.

(*a.*) The ordinance under consideration requires of each physician the performance of a positive duty; the performance of that duty takes the time of the professional man; prevents him from following his usual avocation and demands of him a certain amount of labor, viz., the making of certain reports.

Property is anything which has exchangeable value; labor has exchangeable value and therefore labor is property, and has been so regarded from early times by political economists and jurists.

"*The property which every man has in his own labor,*" says Adam Smith, "as it is the original foundation of all other property, so it *is the most sacred and inviolable.* The patrimony of the poor man lies in the strength and dexterity of his own hands; and to hinder him from employing this strength and dexterity in what manner he thinks proper, without injury to his neighbor, is a plain violation of this most sacred property. It is a manifest encroachment upon the just liberty, both of the workman and of those who might be disposed to employ him. As it hinders the one from working at what he thinks proper, so it hinders the others from employing whom they think proper."

Smith's Wealth of Nations, book 1, ch. 10, part 2.

The great French Economist Say says, "The property a man has in his own industry, is violatcd, whenever he is forbidden the free exercise of his faculties and talents, except insomuch as they would interfere with the rights of third parties."

"The industrious faculties are of all kinds of property the least questionable,—being derived dircctly either from nature, or from personal assiduity."

So have said the economists.

The oft-quoted edict of Louis XVI giving freedom to trades and professions, prepared by his minister Turgot, declares that "God in creating man with necessities, has compelled him to resort to labor, and has made the *right to labor the first, most sacred and imprescriptible right of man.*"

In the Slaughter House Cases, 16 Wall. 36, the majority opinion distinctly intimates that had the right of labor been invaded the decision would have been different, while the dissentient opinions of Field, J., and Swayne, J., were based upon the premises that labor is property, and that the right to labor had been assailed by a (so-called) police regulation.

Id. Parrot's Case, 6 Sawyer, 374.

In Campbell vs. Holt, 115 U. S. 630, Mr. Justice Bradley says, "The term 'property' in this clause, (similar to the one above quoted,) embraces all valuable interests which a man may possess outside of himself, that is to say, outside of his life and liberty. It is not confined to mere tangible property, but extends to every species of vested rights. In my judgment, it would be a very narrow and technical construction to hold otherwise. In an advanced civilization like ours, a very large proportion of the property of individuals is not visible and tangible, but consists in rights and claims against others, or against the government itself."

45 Ill. 90; 7 Pa. Ch. 261; 13 Allen, 370; 2 Yerg. 554; 3 Greenl. 326; Cooley Const. Lim. ch. 11, p. 393; 25 Ct. 19.

We may conclude as Davis P. J. did in passing upon the constitutionality of the (N. Y.) tenement house act. "Without

citing further authorities, it may be stated as a legal and political axiom that since the great laboring masses of our country have little or no property but their labor, and the free right to employ it to their own best interest and advantage, it must be considered that the constitutional inhibition against all invasions of property without due process of law, was as fully intended to embrace and protect that property as any of the accumulations it may have gained."

In re Jacobs, 33 Hun. 375 affirmed in 98 N. Y. 98.

Compulsory reports under this ordinance from each physician are exactions of labor and therefore deprivation of property.

These reports are based upon professional knowledge requiring years of devotion to a single pursuit. That knowledge is obtained by assiduous industry, it represents the professional man's capital, *it is of commercial value to him;* it can bring him an income and a reputation. In the case of the State of Michigan vs. Vaninmans Judge Fuller said: "I decide that a physician's knowledge is his stock in trade, his capital, and we have no more right to take it without extra compensation than we have to take provisions from a grocery store without pay, to feed the jury."

These reports take the time of the physician, forthwith he must make them, not only that, he must furnish the material upon which they are made and either pay for their immediate transmission to the authorized authority or occupy more of his own time in their personal transmission. This labor and this time is his property to do with as he will. He may sell it or he may give it, but no power, whether of the individual or of the government, can touch it, for it is as sacred to the eye of the law as the privacy of his house.

"That which belongs to the citizen in the sense of property, and as such has to him a commercial value, cannot be pronounced worthless or pernicious, and so destroyed or deprived of its essential attributes" Judge Comstock in Wynehamer vs. People 13 N. Y. 386, and Sir William Blackstone in his Com-

mentaries, vol. 1, p. 138, says: "The third absolute right of every Englishman is that of property which consists in the free use, enjoyment and disposal of all his acquisitions without any control or diminution save only by the laws of the land."

Idem, Kent's Com. Vol. 2 p. 320-326.

If *this* ordinance can take a small part of the physician's time; if it can take a small part of his professional knowledge; if it can compel him to labor, *another* ordinance can require more of his time and more of his labor.

"The illegality of a by-law is the same, whether it may deprive an individual of the use of a part or of the whole of his property."

Austin vs. Murray 16 Pick. 127; Id. *In re* Pet. Cheeseborough 78 N.Y. 237.

It is well to recall the words of Chief Justice Marshall in Brown vs. Maryland 12 Wheat, 419. "Questions of power do not depend upon the degree to which it may be exercised at the will of those in whose hands it is placed."

The law covers with its broad mantel the thatched roof of the poor as it does the palace of the rich.

In no less a degree does it protect the sacred right of labor. It knows not kinds nor degrees. When the absolute rights are at stake, with it, there is no such thing as a little wrong, a small taking of property. With it, it is a wrong, it is a taking, and it is against these as against all invasions of property that it wages war under the provision of that clause in our constitution upon which we stand.

(*b.*) Compulsory labor is not only a deprivation of the property, it is an infringement upon the liberty of the physician.

So long as the municipality compels any of its citizens to refrain from their usual and lawful avocations, just so long is it placing an illegal restriction upon their freedom of action and depriving them of the full measure of their liberty.

"That man," said Daniel Webster, "is free who is protected from injury."

Webster's Works Vol. 2, p. 393.

Mackintosh in his essay on the study of Nature and of Nations wrote "Legal liberty consists in every man's security against wrong."

No man is free, no man enjoys legal liberty when he is compelled to suffer the wrong of having any of his time mortgaged to another against his own wish and without consideration to himself. Legal liberty consists equally in the freedom of choice of a pursuit as in the method of its pursuit. at all times and in all ways consistent with a just regard for the rights of others.

It matters not whether the deprivation be for a longer or a shorter time, whether it be great or small.

The authorities abundantly sustain this doctrine. Earl J., in the tenement house case (supra) said, "One may be deprived of his liberty and his constitutional rights thereto violated without the actual imprisonment or restraint of his person. Liberty, in its broad sense as understood in this country, means the right, not only of freedom from actual servitude, imprisonment or restraint, but the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation. All laws, therefore, which impair or trammel these rights . . . . . are infringements upon his fundamental rights of liberty, which are under constitutional protection."

In Butchers' Union Company vs. Crescent City Co., 111 U. S. 746, Field, J., says, among the inalienable rights "is the right of man to pursue any lawful business or vocation in any manner not inconsistent with the equal rights of others, which may increase their property or develope their faculties, so as to give them their highest enjoyment."

Id. Wynehamer vs. People, 13 N. Y. 378 ; People vs. Marx, 99 N. Y. 387; Coryfield vs. Coryell, 4 Wash. C. C. 380 ; Bertholf vs. O'Reilly, 74 N.Y. 575.

Since this ordinance demands that the physician, against his will, shall work for another, since it interferes with his regular pursuit and appropriates his professional knowledge, it must be clear that it is a restriction upon the liberty of the physician.

(*c.*) No man can be deprived of his property or his liberty without due course of law.

The remaining question on this point is, whether "due course of law" has been observed in this case. "Due course of law," "due process of law," "law of the land," are synonymous terms and one or the other is favored in the Constitution of every State in the Union.

"The good sense of mankind has at length settled down to this—that these words (due course of law) were intended to secure the individual from the arbitrary exercise of the power of government unrestrained by the established principles of private rights and distributive justice," says Mr. Justice Johnson, and his words are quoted by our own Supreme Court in Camp vs. Rogers, 44 Ct. 297.

"By the law of the land," says Webster in the Dartmouth College case, "is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry and renders judgment only after trial."

We need not enter into an elaborate discussion of these words, sufficient to say, they are held under the liberal interpretation given to them to protect the life, liberty and property of the citizens against acts of mere arbitrary persons, in any department of the government. For similar authoritative definitions see

Correy vs. Carter, 48 Ind. 352; Hagar vs. Reclamation District No. 18, 111 U. S. 701; Westervelt vs. Gregg, 12 N. Y. 212; Bertholf vs. O'Reilly, 74N. Y. 519.

This ordinance proposes to "forthwith" require of physicians certain reports; if this be a taking of property and restrictive of liberty—where is the judicial inquiry before the arbitrary exercise of power? Where the opportunity to be heard? Where the judgment rendered only after trial? There is none. *The law of the land cannot mean this trial.* "To say that it may mean the very act of legislation which deprives the citizen of his rights, privileges or property, leads to a simple absurdity. The constitution would then mean that no person shall be deprived of his property or rights, unless the legislature shall pass

a law to effectuate the wrong, and this would be throwing the restraint entirely away." Comstock, J., in Wynehamer vs. People, 13 N. Y., 393.

Id. Bronson, C. J., in Taylor ve. Porter, 4 Hill. 145; Hoke v. Henderson, 4 Dev. 15; 2 Kent's Com. 13.

We are forced to the conclusion that *this ordinance takes the property and restricts the liberty of the physician without due course of law and is therefore void.*

Speaking upon the breadth of meaning of a similar clause in the Pennsylvania Constitution, Chief Justice Gibson said, "The design of the convention was to exclude arbitrary power from every branch of the government; and there would be no exclusion of it if such rescripts or decrees were to take effect in the form of a statute. *The right of property has no foundation or security but the law; and when the legislature shall successfully attempt it,* EVEN IN A SINGLE INSTANCE, *the liberty of the citizen is no more.*"

POINT II.

Let us assume that the ordinance takes the property of the physician and takes it for a public use. Then the recognized way in free governments of securing private property for public use is that laid down in Sec. 11, of Art. I, of our State constitution; "The property of no person shall be taken for public use without just compensation therefor."

"The right to life, liberty and property is not absolute or uncontrollable. . . . . Life, liberty or property may be forfeited for crime. *Private property may be taken for public use, on condition of compensation,* or by taxation, or it may be transferred by judicial process for the satisfaction of private contracts, or as a compensation for private wrongs and injuries." Andrews, J., in Bertholf vs. O'Reilly, 74 N. Y., 520. In no other ways can private property be taken for public use.

Talbot vs. Hudson, 16 Gray, 421.

Clearly this ordinance provides no compensation to the physician for the duty imposed upon him. It is futile to urge that the provision above quoted applies exclusively to real property taken under right of Eminent Domain. It applies to all property; it is particularly noticeable as having often been applied to real property, for the reasont that the State may purchase in any market most kinds of personal property while it is one particular piece of real property which it may desire.

The authorities show that this clause covers all forms of property. Thus in Wynehamer vs. People (supra), Judge Comstock, decided that property in liquor fell within the protection of this clause.

Id. Yates vs. Milwaukee, 10 Wall, 497; Russell vs. Mayor of N. Y., 2 Denio., 467; Wilkinson vs. Leland, 2 Pet., 657; Toll Bridge Co. vs R. R., 17 Ct., 60-62.

"And it may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power; and if any can be prescribed, where are they to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation." Marshall, C. J., in Fletcher vs. Peck, 5 Cranch., 185.

This ordinance compels the physician to labor requiring professional knowledge presumably for the public good under the exercise of the police power. The law is such that "when in the exercise of the police power private property or private or vested rights must be taken for public use in order to carry out . . . . regulations looking to the amelioration and benefit of the public health, ... such private property or private rights must be entitled to the protection given by the Constitution of the United States declaring "nor shall private property be taken for public use without just compensation." Pardue, C. J., Water Works cases, 4 Woods, 143.

Chicago vs. O'Brien, 111 Ill., 537.

And while it is true that this clause of the United States Constitution has no application to the legislative or municipal enactments of a State, it is none the less true that the State

courts place the same construction upon this clause as has the United States court.

It is true, undoubtedly, that the property of a private individual may be appropriated to public use in connection with measures of municipal regulations; and in such case compensation must be provided for, or the appropriation will be unconstitutional and void. Baker vs. Boston, 12 Pick., 193. And this is the way our own court has spoken: "It seems almost superfluous to say that under the Constitution of this State private property cannot be taken for public use without just compensation. Indeed, under no government but that of the most grinding despotism could such a power be exerted without such qualification. It violates the great principles of common right." Hardwig vs. Stamford Water Co., 41 Ct., 93.

POINT III.

The 13th Amendment to the United States Constitution prohibits slavery and involuntary servitude.

While the Slaughter House cases (supra) decide that the principal object of this amendment was the freedom of the African race, they distinctly decide that it prohibits all other forms of slavery of whatsoever class or name.

Id. County San Mateo vs. R. R., 9 Saw., 730.

It may well be urged that servitude is not a restrictive term, but is so broad as to cover all kinds and degrees of slavery; that compulsory labor without compensation, such as this ordinance inflicts, is a form of servitude, and therefore within the amendment and illegal. No man subject to this ordinance can be said to possess the liberties and enjoy the privileges of a freeman. Field, J., in Slaughter House cases.

But since the 14th Amendment inhibits legislation of a character similar to this ordinance, it renders it unnecessary that we base our objections to this ordinance upon the protection afforded by the 13th Amendment.

POINT IV.

"Nor shall any State deprive *any person* of life, liberty or property without due process of law; nor deny to *any person* within its jurisdiction the equal protection of the laws." Sec. 1 of 14th Amendment.

These guarantees the majority opinion in the Slaughter House cases, 16 Wall., 36, held to apply to citizens of the United States in their rights as citizens of the United States. We believe the Supreme Court have repudiated this doctrine and adopted the doctrine of the dissenting opinions, so that, to-day, it is universally held that these guarantees apply to all within the territorial jurisdiction of the United States in all their rights as citizens of State or Nation. For in Santa Clara Co. vs. R. R., 118 U. S., the Court declined to listen to argument as to whether the guarantees of the 14th Amendment applied to corporations, being of opinion that they did.

Id. Home Ins. Co. vs. New York, 119 U. S., 141.

In Barber vs. Connelly, 113 U. S., 27, approved in Soon Hing vs. Crowley, 113 U. S., 703, the Court adopts the views and almost the words of Field, J., in his dissenting opinion in the Slaughter House cases and the late cases of In re Ah Jow, 28 Fed. Rep., 187, and In re Tie Lag, 20 Fed. Rep., 611, adopt these views as the law of the land.

In People vs. Marx, 99 New York, 386, it was held that the guarantees of the 14th amendment made null a State statute prohibiting the manufacture of oleomargarine. In State vs. Walruff, 26 Fed. Rep., 195, a State statute forbidding the disposition of property already invested in liquor was held by Judge Brewer to violate the 14th Amendment. The Supreme Court had already held that liquor owned at time of the passage of the prohibitory law was within the protection of this amendment, and Judge Bradley, in the Civil Rights cases, 109 U. S., 3, proceeds on the supposition that it is conceded that had the State denied any citizen the "equal protection of the law," the act would have been void. Again, in Yick vs. Hop-

kins, 118 U. S. 356, this clause of the 14th Amendment is held to apply "universally to all persons within the territorial jurisdiction. The fundamental rights to life, liberty and the pursuit of happiness, considered as indivfdual possessions, are secured by those maxims of constitutional law, which are the monuments showing the victorious progress of the age in securing to men the blessings of civilization under the reign of just and equal laws."

It follows that this ordinance is void, because (*a*) it deprives the defendant of his liberty and property without due process of law, contrary to the 14th Amendment. That it does deprive the defendant of his liberty and property we have demonstrated under Point I; that it does this without due process of law, as understood in the constitutional law of the United States, we have demonstrated by the citations under Point I.

(*b*) This ordinance denies to the defendant equal protection of the law; inflicts a burden upon a class, viz: physicians; it is a burden upon a part of the community in aid of all—in short, it is class legislation.

"All citizens in pursuit of legitimate occupations stand equal before the law, and a police power entrusted to a corporation is unreasonably exercised in making invidious distinctions between citizens endowed with equal rights." Mulenbrinck vs. Commissioners, 13 Vr. (N. J.), 370.

The very intent and object of this amendment is to prevent nnjust discriminations against any person within these United States. *No person can be secure in the equal protection of the laws when subject to disciminating burdens. Legislation denying to a person the equal protection of the laws is void.*

Civil Rights Cases, 109 U. S., 3.

Jeremiah Black and Senator Edmunds, in their argument in Mo. vs. Lewis, 101 U. S., 27, say: "A State under a republican form of government is as imperatively bound to give equal remedial rights as it is to impose equal burdens and obligations."

A municipality may impose wharfage fees upon all using the wharfs, but these must be equal to all or they discriminate and are unconstitutional. Guy vs. Baltimore, 100 U. S., 434. Here the benefitted are burdened, with us the few are burdened while the many are benefitted. In Ah Kow vs. Nunan, 5 Saw., 552, an ordinance requiring the hair of all convicts in county jail cut within an inch of the head, was held to be discriminating legislation and bad, whether it applied to the yellow or to the white man.

Id. Cooley on Const. Lim. p. 493; City of Shreveport vs. Levy, 26 La. 671; County San Mateo vs. R. R., 9 Sawyer, 733.

If it be said that this ordinance does not discriminate, because all in like circumstances are subject to like burdens, and is within the principal of Barbier vs. Connelly and Soon Hing vs. Crowley (supra), which hold that restrictions upon the laundry business are not unjust discriminations because not placed upon other businesses. We answer: The Court found this laundry business needed regulation, and held that the regulations adopted were reasonable exercises of the police power, while in our case this ordinance is no regulation of the business of a physician, but the mere imposition of a duty upon a class deemed most fitted to perform that duty.

The conclusion is irresistible that the ordinance violates the guarantees of the State and Federal Constitution unless it be that it was passed for purposes of taxation, as a forfeit for crime committed, or in the exercise of the police power.

It is obvious that the sole question remaining is, whether or not this ordinance was passed in the lawful exercise of the police power.

POINT V.

Assuming that this ordinance was designed to promote the health and welfare of the community, the question is, can it be justified as a legitimate exercise of the police power of government?

It is hard to determine what the police power of government is. The uncertainty upon this subject is somewhat apparent, since we find Blackstone including within the scope of this power clandestine marriages and bigamy. An eminent jurist has said that it were better to leave the determination open and to decide each instance as it arises, and thus in time, by a process of judicial exclusion and inclusion, arrive at a satisfactory basis for a definition.

This right, as Mr. Justice Grier observes in the Passenger Cases, arose "in the sacred law of self-defense," and it has been said that "it is that inherent and plenary power in the State which enables it to prohibit all things hurtful to the comfort and welfare of society." Lakeview vs. Rose Hill Cemetery, 70 Ill., 191.

Mr. Cooley, in his Const. Lim., No. 572, expanding Blackstone's definition to meet the growing needs of society, says: "The police of a State in a comprehensive sense, embraces its whole system of internal regulation, by which the State seeks not only to preserve the public order and to prevent offenses against the State, but also to establish for the intercourse of citizens with citizens those rules of good manners and good neighborhood, which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own so far as is reasonably consistent with a like enjoyment of rights of others."

These definitions determine that the State may restrain or prohibit all things harmful to the welfare of society, guaranteeing to each person the uninterrupted enjoyment of his own so far as is reasonably consistent with a like enjoyment of the rights of others.

We turn to the ordinance. It burdens those who seek by professional skill to rid the community of all that may be harmful to it. There is no possible connection between the harmful cause and those who bear the burden—they did not create it, nor own it, nor continue it. They are not using their own so as to deny to others the proper enjoyment of their own.

Clearly, then, if we regard the accepted definition, or recognize the determining principle, this ordinance cannot stand as the exponent of either.

The arguments usually addressed to Courts in cases like the one under consideration are generally based on the assumption that the sovereign, in exercising the police power of the State, is absolutely unfettered with regard to all the rights of property.

New Orleans Water Works vs. St. Tammany Water Works, 4 Wood, 143.

To maintain the validity of the ordinance in dispute it will be necessary to urge the illimitability of the police power, while the charter of the city of Bridgeport, p. 25, decrees that all ordinances shall be in harmony with the laws of the State and of the United States. And were this not in the charter it would still be true that the law of this land is the limit to the exercise of this power. We have attempted to discuss the infringements of this ordinance upon our State and Federal Constitution. These instruments were not designed to interfere with the police power of the government, as some Courts have said, *meaning* thereby the rightful exercise of this power. That rightful exercise must in each instance have beneath and behind it some underlying principle, guaranteeing protection to community and citizen alike and demonstrating by itself the validity of the law which it sustains. *An examination of the authorities will demonstrate that Courts have uniformly squared their decisions with the principle that the authority for the exercise of the police power is found in the enforcement by government of the maxim,*

"*Sic utere tuo ut alienum non laedas.*"

As Prof. Tiedeman writes, "The police power of the government as understood in the constitutional law of the United States is simply the power of the government to establish provision for the enforcement of the common as well as the civil law maxim."

Tiedeman on Lim. of Police Power, p. 4, sec. 1.

Chancellor Kent recognizes the same doctrine.

"The government may by general regulation interdict such uses of property as would create missuses and become dangerous to the lives or health, or peace or comfort of the citizens * * * * on the general and rational principle that every person ought to so use his property as not to injure his neighbor."

Kent's Comm., Vol. 2, p. 340.

An ordinance forbidding a railroad to use steam to propel its cars in certain streets was held valid. Wait C. J. "Such prohibitions clearly rest upon the maxim *Sic utere tuo ut alienum non laedas*, which lies at the foundation of the police power."

R. R. Co. vs. Richmond 96 U. S. 527.

Chief Justice Shaw in the case of Commonwealth vs. Alger 7 Cush, 84, upon declaring the constitutionality of a law establishing habor lines in Boston harbor said: "We think it a settled principle, growing out of the nature of well ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community."

And in a case determining the validity of a law requiring railroad companies to provide cattle crossings, Chief Justice Redfield said in an opinion more widely quoted than any other upon this subject, "This police power of the State extends to the protection of the lives, limbs, health, comfort and quiet of all persons, and the protection of all property in the State. According to the maxim, *Sic utere tuo ut alienum non laedas*, which being of universal application, must, of course, be within the range of legislative action to define the mode and manner in which every one may so use his own as not to injure others."

Thorpe vs. R. R., 27 Vt. 149.

In our own Courts in Hooker vs. R. R. Co., 15 Ct. 321, the Court says, "This maxim * * * * is as applicable to one claiming under legislative grant as to one claiming under private grant, to public corporations as to individual citizens."

And in State vs. Sargent 45 Ct. 374, in deciding that the State might establish harbor lines, Pardee, J. says, "The public do not propose in any manner to appropriate or use any right of the respondents in the soil of the shore, but only to guard against any invasion by them of the permanent right of the public to navigate the waters over it; to enforce against them the maxim, *sic utere tuo ut alienum non laedas.* It is only the exercise of the police or supervisory power vested in the legislature—the power to enact such laws as they deem reasonable and necessary for the regulation of the use by riparian proprietors of their qualified right to the soil of the shore."

So has our Court of last resort grounded the exercise of this power.

Again and again in protecting the rights of citizens against the injustice of legislation, in instances properly the subject of police regulation, the Courts have planted the standard of succor upon this salutary maxim, impregnated with the spirit of the golden rule, known to every jurist and approved by every moralist. And the law is such that every exercise of the police power by State or municipal legislation, over the persons or property of their subjects, irreconcilable with this principle, is beyond the power vested in such State or municipality.

For the application of this same principle see

Eastman vs. State, 7 West Rep. 421. (Ind. s. c., Jan. 1887); Hacket vs. State, 105 Ind. 250; Cooley vs. Const, Lim. p. 577; Munn vs. Ill. 94 U. S. 113; R. R. vs. Husen, 95 U. S. 474; Goddard Petitioner 16 Pick. 510; Waterman vs. Mayo 109 Mass. 319; *In re* Pet. Cheeseborough 78 N. Y. 237; Bertholf vs. O'Reilly 74 N. Y. 514; Knoxville vs. Bird 12 Lea (Tenn.) 125; People vs. R. R. 9 Mich. 307; State vs. Court Com. Pleas 7 Vt. 77.

An eminent jurist has observed that the unwritten law of this country is in the main against the exercise of the police power, and the restrictions and burdens imposed upon persons and private property by police regulation are jealously watched and scrutinized.

For the good order of the society we find that there is permitted the regulation of: railroads at crossings, 8 Vt. 348; the

erection of wooden buildings within certain limits, 7 Paige, 263; the cleaning of snow from sidewalks, 16 Pick. 504; warehouses, 94 U. S. 124; auction business, 68 Ill. 376; erection of sewers, 1 Met. 13; keeping of dogs, 100 Mass. 140; use of bowling alleys, 8 Gray, 488; sale of gunpowder, 1 Gray, 27; harbor lines, 7 Cush. 86; running of animals at large, 45 N. Y. 356; position of vessels in harbor, 7 Cow. 350; trapdoors in stores, 15 N. Y. 507.

For the good health of society we find regulations concerning sanitary condition of vessels entering from foreign ports, 118 U. S. 455; laundry business, 118 U. S. 356; transportation of cattle, 95 U. S. 465; oleomargarine manufacture, 99 N. Y. 386; laying of sewers, 1 Met. 130; liquor traffic, 18 Wall. 129; slaughtering of animals, 16 Wall. 36; carrying of offal, 6 Pick. stagnant waters, 16 O. S. 55; nuisances on lowlands, 126 Mass. 436; sale of milk, 12 Allen, 265.

It will be found upon an accurate examination of these instances and of the cases to be found in the books that a few are of the prohibitory kind, but that the greater part are regulations of a preventive or restrictive kind, checking the use of one's property or person, so that neither may cause disturbance and injury to the lives, liberty or property of others. And this is the end of police regulations, for Jeremy Bentham wrote "Police is, in general, a system of precaution, either for the prevention of crimes or calamities."

When the owners of lots fronting on Lake Michigan are prohibited digging away their lots (30 Wis. 316,) the reason of the regulation is apparent,—the waters of the lake may inundate the city; where slaughter-houses are regulated; where the liquor traffic, the selling of explosives, pawn shops, use of cemeteries, cleaning of sidewalks; where these are regulated by positive enactment, the State has found that the public welfare demands that such property and such business be regulated and supervised, to the end that no person may employ his own to the detriment of others.

This power of regulation prevents the active misuse of property or person; no less may it prevent the passive enjoyment of person or property when from changing conditions this passive enjoyment may become an active or threatened danger to others.

Let us look at the ordinance in dispute:

It concerns those engaged in the practice of medicine, this practice is lawful. The public have an interest in the skillful and faithful performance of this pursuit, they may regulate it whenever it has or may prove dangerous to the community. This can happen in one way, viz., by the incompetence of practitioners. A proper regulation would tend to exclude the unskillful and the incompetents. A physician can injure his neighbor simply by his incapacity and ignorance. Let the State anticipate and prevent this.

This ordinance is no regulation of the business of the physician, it does not pretend to regulate. Regulation implies present or prospective wrong-doing or wrong acting. This ordinance does not prevent either; it is not in force for the reason that the physician is using his own to the injury of others. He is not, he is here contending that he be allowed to use his own in his own way, at his own time, and for the public good always.

It is futile to argue the point; we rest upon this statement. Each exercise of the police power can be sustained only upon the theory and fact that some person or persons are misusing tneir own to the injury of others.

This ordinance was not enacted for the purposes of regulalation; the physician has not abused his own. It follows that the ordinance does not rest upon the principle upon which the ablest jurists and the wisest courts have based this power.

We submit that no principle other than that named can be invoked to sustain the exercise of this most plenary of all the powers of government.

Further, the majority of instances wherein the police power has been sustained are those of precaution, prevention and prohibition. The case at bar differs; it is an instance not prohibiting *this*, but commanding *that*, viz: the physician to make certain reports based upon his own professional knowledge. It is the imposition of a positive burden upon a particular class.

Instances of the police power imposing positive burdens are rare and when sustained are found to stand upon the doctrine that a man's own must not injure another, and because the positive burden carries with it a peculiar benefit or advantage to the burdened unshared by the public.

In the Quarantine cases (Morgan R. R. & Steamship Co. vs. Louisiana, 118 U. S. 455,) the State statute compelled each vessel entering the harbor of New Orleans to submit to examination under the State quarantine system. So far there is no question as to the right of regulation, for the business may prove dangerous to the public. The quarantine system went further: it required the examined vessel to pay a fee which was devoted to the maintenance of the quarantine system. Here was the imposition of a positive burden, the taking of private property for public use. Where is the justification?

The system benefits the whole State while the vessel obtains from it a peculiar and especial benefit in which the people at large cannot share.

As Mr. Justice Miller said (p. 458,) "that the vessel itself has the primary and deepest interest in this examination it is easy to see. *It is obviously to her interest, in the pursuit of her business, that she enter the city and depart from it free from the suspicion which at certain times attaches to all vessels coming from the Gulf. This she obtained by the examination and can obtain in no other way.*"

Id. Train vs. Boston Disinfecting Co. (May 12, 1887,) N. E. Rep. 929.

The City of Boston vs. Shaw, 1 Metc. 131, presented the following facts: A by-law of the city of Boston required that every person entering his drain into a common sewer should pay a just proportion of the expense of constructing such common

sewer. Upon the validity of this by-law the Court said, "It is better for the city to construct and own it (the sewer) and it must be considered as reasonable, that the charge should fall upon the lots abutting, which would have the privilege of entering particular drains from the respective lots into the main drain or common sewer. *The right and privilege would become appurtenant to the several lots, and their value would thereby be increased probably quite as much as the amount which should be required to be paid towards the general expenditure,*"

It is to be noted that a public improvement benefitting the whole community is to be paid for by adjoining lot owners because it proves of *particular* and *special* benefit to them.

A case similar in principle is that of Paxson vs. Sweet, 13 N. J. L. 190. A city ordinance requiring owners of lots fronting on a certain street to lay curbstones and a brickway in front of their lots was held reasonable, for the lot-owner receives compensation for this public improvement, by the increased value of his property, by the enhanced health and comfort of his household, by the enjoyment of like footways everywhere, without contributing to their cost.

"Why," says the Court, "should corporation funds be expended on improvements to private property, in which the public cannot participate. The lot is worth as much more as is expended on it. When the owner sells his lot, he will put this increased value in his pocket, and therefore he ought to do the work himself or pay an equivalent for having the work done in some way."

This case reiterates the principle of all cases that public burdens placed upon a class must bring an especial and equivalent advantage to the class or they are unlawful.

The leading case upon this whole subject of the imposition of positive burdens under the police power, is Goddard, Petitioner, 16 Pick. p. 504. There the validity of an ordinance requiring lot-owners within certain limits to keep the sidewalks fronting their property free from snow, was passed upon. The Court held the ordinance valid, because it did not make an ar-

bitrary selection of a class, for the purpose of placing upon it a burden. It placed the burden upon a class during a peculiar and esspecial compensatson for the duty imposed. The sidewalk belongs to the lot-owner, subject to the public easement of passing and repassing; cleaning the sidewalk is keeping his property so that it may not injure the public. The city is liable for injuries resulting from ill-kept sidewalks. Why may not the city reduce its liability to the minimum, by compelling the lot-owners who owns the sidewalk to keep it in a safe condition? When the city limits its liability it lessens the burden of taxation. Each public improvement adds to the value of property, so good streets and good sidewalks enhance the value of all property, more particularly that property in front of which the sidewalk is.

This particular benefit is the consideration for this particular burden. The Court, by Shaw, C. J., so held in these words: "If this were an arbitrary selection of a class of citizens the objections would have greater weight. But suppose there is a class of citizens who will themselves commonly derive a benefit from the performance of some public duty, we can see no inequality in requiring that all those who will derive such benefit shall by a general and equal law be required to do it. Supposing a by-law should require every inhabitant who keeps a cart, truck or other team, or a coach or other carriage, to turn out or send a man, with one or more horses, after each heavy fall of snow, to assist in leveling it. *Although other citizens would derive a benefit, yet as these derive some peculiar benefit, accompanied with the ability, I can at present perceive no valid objection to a by-law requiring it* on the ground of inequality. . . . And it appears to us the case before us is similar. Although the sidewalk is part of the public street, and the public have an easement in it, *yet the adjacent occupant often is the owner of the fee, and generally has some peculiar interest in it and benefit from it, distinct from that which he enjoys in common with the rest of the community.* He has this interest and benefit, often in accommodating his cellar door and steps, a passage

for fuel, and the passage to and from his own house to the street. To some purposes, therefore, it is denominated his sidewalk. For his own accommodation he would have an interest in cleaning the snow from his own door. The owners and occupiers of houselots and other real estate therefore have an interest in the performance of this duty peculiar and somewhat distinct from that of the rest of the community."

Upon the authority of this case Judge Christiancy rests his decision in Woodbridge vs. Detroit, 8 Mich., and says the only reason for imposing upon the owner of a lot the whole expense of constructing a sidewalk in front of it is this "peculiar" interest or qualified property which a man is supposed to have in the sidewalk. Judge Cooley recognizes the same underlying principle. Cooley on Tax, pp. 588–591; cases cited, p. 589, and cites Goddard, petitioner, as the leading authority.

To the same effect:

State vs. Newark, 8 Vr., 423; Mayor vs. Maybury, 6 Hun, 371;
Palmer vs. Way, 6 Col., 107; Village of Buffalo, vs. Webster, 10 Wend., 100.

The guiding and controlling principle of these cases is that whenever a burden, of benefit to a whole community, is placed upon a portion of that community there must be peculiar and especial benefit to the portion of the community so burdened. Ordinances imposing positive duties or laying positive burdens have been and can be upheld simply, wholly and entirely because they are grounded upon this principle, universally sanctioned and uniformly sustained.

Of the ordinance in dispute we ask what peculiar and especial benefit inures to that portion of the community, viz., the physician, upon whom is cast the burden of reporting cases of infectious diseases?

The ordinance discloses none, the finding none, there is none. The city takes, it does not pay for the taking; it imposes a duty, it grants no correspondent benefit. Tested by the principle of the cases the ordinance proves itself invalid.

The vocation of the physician is lawful, and the right of any person to pursue it is subject to such restrictions only as the

Legislature may impose in the exercise of its general police power. Eastman vs. State (Jan., 1887), 7 West Rep., 421.

Since in our government there is no unlimited deposit of powers anywhere (Loan Assn. vs. Topeka, 20 Wall, 662), it is the duty of our courts to guard vigilantly against any needless intrusion whereby rights, though held subject to the police power of the State, are invaded by exercises of this power unsupported by principle or doctrine. R. R. vs. Husen, 95 U. S., 474.

The limit to the exercise of this power is the law of the land.

We have demonstrated that the law of land denies validity to any ordinance, police in nature, not founded on one or both of these principles:

1. Every man must use his own so as not to injure another.

2. All burdens of public benefit falling upon a class must give to the burdened a special benefit unshared by the public.

The ordinance in question is founded upon no principle, and lives, if at all, solely because it is supposed to conduce to the common welfare. If the State limited the practice of medicine to those admitted to practice by certificate upon due examination, there might be some little foundation for a claim that the State gave to this class a peculiar benefit and was now exacting its tributes for benefits given.

The practice of medicine is not privileged; all may engage in it, but in Connecticut, we impose no regulation of qualification upon the practitioner. The smith may leave his anvil today and on the morrow announce himself a physician and surgeon. Nowhere is there a possible consideration to sustain the peculiar burden of the ordinance.

It comes to this: the city needed the information of the physician; it not only demanded it, but it prescribed the manner of the giving.

If this doctrine of the unlimited exercise of the police power can stand, then the city has but to demand, in the name of the police power, our person and property, and if there be a certainty or possibility that its demands are for the public good they must be granted. An examination of the statutes of the States of the Union, in whose limits statutes or ordinance similar to the one in dispute are existent, will disclose that, with one or two exceptions, these States limit the number of physicians by prescribing certain qualifications, the aim being to exclude incompetents from the practice. Here, then, is a *quid pro quo* for placing a public burden upon a limited few, bringing these instances within the principle of Goddard, Petitioner.

Yet in some States, as though anticipating this very point, we find recent Legislatures granting a fee for each report made. Thus, in

N. J. P. L., 1883, ch. 105, sec. 7; Mich. P. A., 1883, vo. 11, p. 7.

And in our own State, in a police regulation very similar to the regulation we question, the State provides compensation for each reported case of birth or death.

P. A. Conn., 1884, ch. 94.

In no State, we believe, can be found an ordinance similar to the one we question, *where* the State does not prescribe qualifications to the practice of medicine. The case of Robinson vs. Hamilton, 60 Io., 134, was an action to recover a penalty for failure to report a birth as required by statute. This was held a valid regulation.

It is to be noted that Iowa prescribes qualifications for physicians; that this was a statutory, while ours is a municipal regulation; that it was a Moot *case*, unargued; that the Court in its opinion said: "it cannot be expected that we shall consider arguments of which we have not heard, or that we will imagine objections and discuss them."

The Court held the law valid—

(1) Because the regulation required the collection of statistics similar in object to census statistics; the State had the

right to collect the one, why not the other? We answer: We do not question the right of the State to collect these statistics. That is not the point. We question the method.

(2) The Court did not consider the unjustness of the provision because the Legislature prescribed it. In our case the municipality prescribes, the judiciary may question.

(3) The Court observes that it is hard to discover oppression in requiring the medical profession to make known their professional knowledge. Such reasoning forgets the sacred right of property.

(4) The Court says duty and the ethics of the profession demand compliance with this regulation. We answer: "The police power of the government cannot be brought into operation for the purpose of exacting obedience to the rules of morality and banishing vice and sin from the world. The moral laws can exact obedience only in *foro conscienciae*." Tied. on Lim., Pol. Power, 368.

POINT VI.

This ordinance is unreasonable and void.

It is well settled that in order to be valid they (by-laws) must not be unreasonable, oppressive or in conflict with the general law of the State.

Southport vs. Ogden, 23 Ct. 131.

And whether an ordinance is unreasonable or oppressive is for the Court to say.

Commonwealth vs. Worcester, 3 Pick. 473.

(*a.*) If we have demonstrated that this ordinance takes the property of the physician, though it be for a public use, unless compensation be made or some unusual benefit conferred, the taking must be held an unreasonable and unwarrantable exercise of power and therefore void.

This is so by the laws of the land whether the constitution provided for it or not. Under the power reposed in Courts, to declare an ordinance unreasonable, under the power vested in them to protect all in their indisputable, inalienable and common rights, they may proclaim the act a nullity.

Sinnickson vs. Jackson, 2 Hare, (N. J.) 129.

(*b.*) If we have demonstrated that this ordinance restricts the liberty of the physicibn ; that it burdens a class without giving especial benefit for the infliction, its unreasonableness follows ; the last instance being within the authority of Goddard, Petitioner.

The Court may find that a public necessity requires the making of these reports. This demonstrates their public purpose. It does not follow that the means adopted are reasonable or lawful.

The public receive the benefit, why should they not maintain the burden ? It is unreasonable to make a class bear without compensation a public burden.

(*c.*) The physician, we know, communicates the nature of the disease to the friends of the sick. Then the family should properly make these reports. They have, within their midst, the afflicted one ; it is fitting that the authorities should compel them to adopt such measures that the rights of others are not injured. The physician should not furnish these reports ; neither his knowledge nor his business will be controlled by their making. The householder should make them, the owner of the house in which resides the sick, the family to whom the sick belong ; they are the proper persons to furnish these reports, and the only persons the State can compel to this duty, without trespassing upon the rights of liberty and property.

The highest medical authority concur in this view, men whose fame is so secure that we may trust to the disinterestedness of their opinion.

"The compulsory notification of infectious diseases to the health authorities, is a matter presenting much greater difficul-

ties than that of certificates as to cause of death. *The State has no right to require such notification from the physician without giving some quid pro quo*, and it is not expedient to make it compulsory, *even* with payment, except from physicians employed by the State or municipality to furnish gratuitous medical attendance to the poor. The State has the right to require such information from the parent or householder, and it has also the right to require the physician to notify the parent and householder, as soon as he recognizes the existence of such infectious disease." Dr. John S. Billings, U. S. A., in article on Hygiene, in Pepper's System of Medicine.

Upon principle the physician may be required to notify the parent or householder. This is a mere regulation of the practice of his profession. He is paid for his best professional skill. That requires that he use that knowledge for the best interests of his patients. Only by means of the information the physician may give, can the patient know the character of the disease, and use his own, so as not to injure his neighbor. Manifestly, then, the physician may be subjected to this regulation.

(*d.*). When we consider the vast variety of diseases comprised under the head "contagious diseases," we are ready to conclude that quite a large percentage of all cases which medical practitioners have fall under this head. We can thus see how many reports a busy practitioner must make. He must make them forthwith. That means either at once or within a reasonable time; it means that he must either bear the report himself to the proper authorities or pay for its carriage, and for that upon which it is made. This, we say, is a direct interference with his business. His time is his own, his business his own, his knowledge his own, and the property he has accumulated his own. It is unfair and unreasonable to burden that business.

(*e.*) When the physician makes these reports, it is to be presumed that the authorities make use of them. That use must result in an examination. Experience tells us that those who give the information causing the examination and publicity,

must bear the resentment of the patient and friends, no matter whether the law provides for the making of these reports or not.

That cordial and pleasant relations between physician and patient are indispensable to his success will be admitted. Whatever breaks or impairs these relations is so far an interfer- with his business.

An ordinance requiring each druggist within 10 days after the expiration of each quarter of the year, to furnish to the city clerk a statement of all intoxicating liquors sold by him or his agent, was held void.

City of Clinton vs. Phillips, 58 Ill. 103.

The Court said this section "was an invasion of the sanctity of private business and ought not to be tolerated. There was no power to enact it."

Here was a business which needed regulation, ours does not. Here the object was regulation; with ours it was not.

In R. R. vs. City of Jacksonville, 67 Ill., 37, an ordinance required a flagman at a crossing, not unusually dangerous. Held unreasonable and within the constitutional limitation, on the exercise of the police power.

In Thomas vs. City of Hot Springs, 34 Ark. 553, an ordinance forbidding the soliciting of patients by a physician held void. The Court said: "These are lawful occupations, and to make it a crime to solicit custom is unreasonable, and an unwarrantable interference with constiutional rights."

In Hayes vs. City of Appleton, 24 Wis. 542, it was held that it must be shown by proof, what evil the ordinance proposed to remedy. In our case nothing appears to show what threatened evil is to be averted.

Enough does appear upon the face of this ordinance to warrant this Court in holding it to be a clear infraction of the constitutional rights of the defendant, and an unwarrantable interference with his privileges as a citizen under our form of government.

The State may take private property for taxation; it may take it for public use upon making compensation; it may take it upon judicial process; it may take it as a forfeit for crime; in times of conflagration, in the ravages of pestilence, under pressure of an overruling necessity to prevent a public calamity, it may take private property. It may control its use and possession, so far as may be necessary for the protection of the rights of others. *Beyond such limit the power of the State does not and cannot extend.* Munn vs. Ill. supre.

The ordinance is not for purposes of taxation; no public calamity impends, no judicial process demands a forfeit, no compensation is afforded; the rights of no man are imperiled by the use the defendant made of his person and property. Then where is its justification? It inflicts a burden upon this defendant; by what right or principle? by none save the right of might.

We know full well how careful this Court has been in declaring a legislative enactment void; we know how clearly it has spoken when it has found clear invasions of constitutional rights.

Trustees of Bishop Fund vs. Rider, 13 Ct. 93.

In these days, when govermental interference is proclaimed as the panacea for all social evils, conservative classes fear the absolutism of a democratic majority; there need be no fear so long as the judiciary nour ish and maintain the popular reverence for the constitution, State and Federal, by promptly checking all violations of its provisions.

This defendant is an honored member of an honorable profession; he is denied the right to pursue his calling in his own way and his own time. Nay, he is compelled to give his time, his knowledge and his labor to this municipality—to give it without compensation.

He has refused.

And you behold the physician in the dock, placed there because he believed that government could not compel him to unrequited labor; because he believed that the guarantee of protection to his liberty and his property, made by State and Federal Constitutions, could keep him secure in his liberty and property from the interference of government; because he believed that any blow aimed at them would be "caught upon the broad shield of our blessed constitution and our equal laws."

WHEELER & CURTIS,
for Defendant.